IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**RULING: DEFENSE MOTION**
v.	)	**TO DISMISS SPECIFICATION 1**
	)	**OF CHARGE II FOR FAILURE**
MANNING, Bradley E., PFC	)	**TO STATE AN OFFENSE**
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company,	)	
U.S. Army Garrison, Joint Base Myer-	)	DATED: 25 April 2012
Henderson Hall, Fort Myer, VA 22211	)	

Defense moves the Court to dismiss Specification 1 of Charge II for failure to state a cognizable offense under Article 134 because it is preempted by Article 134, or, in the alternative, that the specification must be charged as a violation of Article 92. Government opposes. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Factual Findings:

1. Specification 1 of Charge I alleges that PFC Manning "between on or about 1 November 2009 and on or about 27 May 2010, without proper authority knowingly gave intelligence to the enemy, through indirect means" in violation of Article 104, UCMJ.

2. Specification 1 of Charge II, alleges that PFC Manning "wrongfully and wantonly caused to be published on the internet intelligence belonging to the United States government, having knowledge that intelligence published on the internet is accessible to the enemy, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces" in violation of Article 134, UCMJ.

3. At the time of PFC Manning's alleged unlawful actions, Army Regulation 380-5 (Department of the Army Information Security Program) was in effect. The regulation is a punitive lawful general order per paragraph 1-21 which states the following:

1-21. Sanctions

a. DA personnel will be subject to sanctions if they knowingly, willfully, or negligently -

(1) Disclose classified or sensitive information to unauthorized persons.

(2) Classify or continue the classification of information in violation of this regulation.

(3) Violate any other provision of this regulation.

b. Sanctions can include, but are not limited to warning, reprimand, suspension without pay, forfeiture of pay, removal, discharge, loss or denial of access to classified information, and removal of original classification authority. Action can also be taken under the Uniform Code of Military Justice for violations of that Code and under applicable criminal law, if warranted. .

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4. AR 380-5 defines classified information as "information and material that has been determined, pursuant to EO 12958 or any predecessor order, to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary and readable form. Sensitive information but unclassified information is defined as "information originated from within the Department of State which warrants a degree of protection and administrative control and meets the criteria for exemption from mandatory public disclosure under the Freedom of Information Act." Sensitive Compartmentalized Information is defined as "classified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems established by the Director of Central Intelligence.

5. Intelligence is defined under Article 104c(4) as information that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. Intelligence imports that the information conveyed is true or implies the truth, at least in part.

The Law - Preemption:

1. The preemption doctrine is explained in paragraph 60(c)(5)(a) of the Manual for Courts-Martial (MCM), which provides, in pertinent part:

> The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking – for example, intent – there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

MCM, para. 60(c)(5)(a).

2. In *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979), the then Court of Military Appeals (CoMA) stated that the doctrine of preemption is defined as "the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, simply by deleting a vital element." The CoMA also stated, "However, simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger the preemption doctrine. *Id.*

3. Military appellate courts apply a two-pronged test to determine whether an Article 134 charge is preempted by another Article. Both prongs must be met for preemption to apply. First, it must be established that Congress "indicate[d] through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article, and may not be charged under Article 134, UCMJ." *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010); *see Kick*, 7 M.J. at 85; *United States v. Wright*, 5 M.J. 106, 110-11 (C.M.A. 1978). Second, it must be shown that the offense charged under

Article 134 is composed of a "residuum of elements" of an enumerated offense under the UCMJ. *Wright*, 5 M.J. at 111;

4. Military courts are "extremely reluctant to conclude that Congress intended [] provisions to preempt [an] offense…in the absence of a clear showing of a contrary intent." The fact that an Article 134 offense embraces all but one element of an offense under an enumerated article does not trigger the preemption doctrine. *See Kick*, 7 M.J. at 85.

5. The issue of whether Congress indicated through direct legislative language or express legislative history that Article 104 cover a class of offenses in a complete way addressed by the Court of Appeals for the Armed Forces (CAAF) in *Anderson.* In that case the Government charged the accuswed with violating Articles 80 and 104, UCMJ by knowingly giving intelligence to the enemy and two specifications of attempting to communicate with the enemy. The accused was also charge with violating Article 134, UCMJ, by wrongfully and dishonorably providing information on U.S. Army troop movements to persons whom the accused thought were Tariq Hamdi and Mohammed, members of the al Qaida terrorist network, such conduct being prejudicial to good order and discipline in the armed forces, and of a nature to bring discredit upon the armed forces. CAAF applied the two-part preemption test and concluded Article 104 did not preempt an Article 134 offense for distributing sensitive material to individuals not authorized to receive it. First, the CAAF concluded that "the legislative history of Article 104 does not clearly indicate that Congress intended for offenses similar to those at issue [i.e., the distribution of sensitive material to individuals not authorized to receive it] to only be punishable under Article 104 to the exclusion of Article 134." Therefore, the CAAF concluded that the Article 104 and Article 134 offenses may encompass parallel facts but the charged offenses are directed at distinct conduct.

Analysis: Preemption

1. Despite the Defense's attempt to distinguish this case from *Anderson*, the facts of *Anderson* are sufficiently similar to prove controlling. The CAAF in *Anderson* concluded Article 104 did not preempt an Article 134 offense for distributing sensitive material to individuals not authorized to receive it. The accused in *Anderson* provided undercover FBI agents, posing as al Qaeda operatives, computer diskettes containing classified information on the vulnerabilities of military operations. The accused was convicted of attempting to give intelligence to the enemy, attempting to aid the enemy, and conduct prejudicial to good order and discipline.

2. In applying the two-part preemption test in this case, the Court finds that the charged offense of Article 134, UCMJ, in Specification 1 of Charge II, is not preempted by Article 104, UCMJ. Prong 1 of the 2 part test is not met. There is no direct legislative language or express legislative history to show that Congress demonstrated its intent that Article 104 "to cover a class of offenses in a complete way."

3. In applying prong 2 of the test, the charged Article 134 offense is not composed of a residuum of elements of the Article 104 offense. Each offense requires a different *mens rea.* The Article 134 offense requires that the accused "wantonly" caused to be published intelligence belonging to the United States government on the Internet. The Article 104 offense requires the

Government to prove the accused "knowingly" gave intelligence to the enemy and that the enemy received it. The Article 134 offense requires the Government to show that the accused "wantonly" published intelligence on the internet knowing that such intelligence is accessible to the enemy. "Wanton" is not a residuum of "knowing". The Article 134 offense punishes the wanton publication of intelligence on the internet not giving intelligence to the enemy.

4. Article 104 does not preempt the Article 134 offense charged in specification 1 of Charge II.

The Law – Article 92:

1. Article 134, UCMJ, provides in full as follows:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

2. Violations of customs of the service that are made punishable in punitive regulations should be charged under Article 92 as violations of the regulations in which they appear. No custom may be contrary to existing law or regulation. Explanation to Article 134, Part IV, paragraph 60, c(2)(B).

3. Article 92, UCMJ, provides for punishment of any person subject to the UCMJ who "(1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties[.]" *Id.* § 892

4. In *United States v. Borunda,* 67 M.J. 607 (AF. Ct. Crim. App. 2009), the Air Force Court of Criminal Appeals (AFCCA) stated that possession of drug paraphernalia must be charged under Article 92 rather than Article 134 where a punitive regulation proscribes the conduct. *Citing United States v. Caballero*, 49 C.M.R. 594 (C.M.A. 1975), AFCCA upheld the use of Article 134 to prosecute the appellant for possession of drug paraphernalia where no lawful general order or regulation proscribed such possession, concluding that "in the absence of a lawful general order or regulation, charging officials are at liberty to charge the possession of drug paraphernalia as a violation of Article 92(3), UCMJ, or Article 134, UCMJ."

Analysis:

1. If AR 380-5, paragraph 1-21 is not punitive, then there is no issue whether specification 1 of Charge II is properly charged under Article 92 or 134. The Court assumes for the purposes of this motion that AR 380-5, paragraph 1-21 is punitive.

2. Specification 1 of Charge II, charges the accused with wrongfully and wantonly causing to be published on the internet intelligence belonging to the United States government, having knowledge that intelligence published on the internet is accessible to the enemy, such intelligence being prejudicial to good order and discipline and of a nature to bring discredit upon the armed force. The conduct at issue in specification charged Article 134 offense is distinct from an Article 92 offense under AR 380-5, para. 1-21a. AR 380-5 punishes knowing, willful, or negligent disclosure of classified or sensitive information to unauthorized persons. It does not punish the "wanton" conduct charged in specification 1 of Charge II and intelligence encompasses more than classified and sensitive information.

3. The question in this case is whether the existence of a punitive regulation governing information security that punishes knowing, willful, and negligent disclosures of classified information to unauthorized persons precludes the Government from charging an offense under Article 134 that includes a wanton *mens rea,* adds an additional element not included in the AR 380-5 offense, that the accused knew that intelligence published on the internet is accessible to the enemy, and punishes the distribution of "intelligence" which includes information that does not fall within AR 380-5, where the conduct charged under Article 134 is prejudicial to good order and discipline in the armed forces or service discrediting.

4. The Court finds that the fact that there is a punitive regulation governing the Army Information Security Program, AR 380-5, that does not proscribe the conduct charged in specification 1 of Charge II, wrongful and wanton publication of intelligence on the internet knowing that such intelligence is accessible to the enemy, where such conduct is prejudicial to good order and discipline or service discrediting does not preclude the charge under Article 134. This case is distinct from *Borunda*, as that case addressed an Article 134 specification where the offense charged was specifically proscribed in a punitive regulation. Because the conduct charged in specification 1 of Charge II is not specifically proscribed by AR 380-5, the Government is "at legal liberty to charge the offense as a violation of Article 92(3) or Article 134." *Borunda*, 67 M.J. at 609-10.

RULING: The Defense Motion to dismiss Specification 1 of Charge II for preemption and failure to state a cognizable offense under Article 134 is **DENIED**.

So **ORDERED**: this 25th day of April 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit